FILE COPY

FILED
MAY 11 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969.

No. 1388.

WHEATON GLASS COMPANY, a Corporation,
Petitioner,

v.

GEORGE P. SHULTZ, Secretary of Labor,
United States Department of Labor.

REPLY MEMORANDUM FOR PETITIONER.

Bruce W. Kauffman,
William T. Coleman, Jr.,
David Pittinsky,
Edward F. Mannino,
2600 The Fidelity Building,
Philadelphia, Pennsylvania. 19109
Attorneys for Petitioner,
Wheaton Glass Company.

Of Counsel:
Marcus Manoff,
Dilworth, Paxson, Kalish
& Levy.

Joseph B. Kauffman,
1421 Atlantic Avenue,
Atlantic City, New Jersey. 08401

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

REPLY MEMORANDUM FOR PETITIONER.

This short Reply Memorandum is not intended as a comprehensive rebuttal of all contentions raised by Respondent, but only those to which some response was deemed appropriate.

1. Respondent completely misapprehends the holding of the Court of Appeals, which clearly did *not* turn on a difference with the District Court on the interpretation of the word "equal"[1] since the District Court expressly adopted the "substantially equal" test (Petition, A40, 52-54, 57-59):

> "The factual dispute between the parties involves the question of how much, if any, of the work performed by male selector-packers **differs substantially** from that performed by the females."
>
> • • •
>
> "The *basic issue,* of course, requires a determination of whether there is a difference in fact between male

1. In any event, Respondent concedes that there are substantial grounds for a difference of opinion as to how the word "equal" should be interpreted, and admits that the proper interpretation raises important issues in the administration and application of the Equal Pay Act (Memorandum for the Respondent in Opposition, pp. 13, 9). While Respondent cites some legislative history from the Senate on the point, the legislative history in the House of Representatives relied upon here by Petitioner is controlling. Representative Goodell was the author of the first bills *in either body of Congress* to place the Act under the Fair Labor Standards Act of 1938 and to use the words "effort," "responsibility" and "working conditions" in defining equal work. It was also the House, not the Senate, which substituted the word "equal" for the word "comparable." Although the Senate bill, S. 1409, became the Act in title, it did not become the Act in substance. The House Amendments to the Senate bill, which were agreed to and adopted *in toto* by the Senate and enacted into law, struck out all the Senate bill after the enacting clause and inserted the House bill as the text of the Act in lieu thereof (109 Cong. Rec. 9761-9762).

and female performance in the job of selector-packer and, if so, *whether such difference is* **essential** *and* **substantial** enough to constitute a realistic economic basis for disparity in wage rates. However, *if such difference is merely incidental, insignificant and insubstantial* to the performance of the principal task of the department in question, then it must be concluded that it is more artificial than real, leaving sex as the only realistic and distinctive basis for the wage disparity, contrary to the Act." (Petition, A40, 53-54) (Emphasis and boldface supplied.)

2. Rather than rest its decision on the interpretation of the word "equal," as Respondent contends, the Court of Appeals performed a judicial job evaluation at the appellate level and clearly indicated its decisional reliance upon the *amount* of the particular wage differential (Petition, A67, 71, 75, 76).[2] Indeed, the Court of Appeals repeatedly referred to the existence of a "10% pay differential," citing it some eight times (Petition, A65, 70, 71, 75, 76). As pointed out in the Petition, such a decision not only is unsupported by the statutory language, legislative history and administrative regulations, but emasculates the conciliatory framework of Title VII of the Civil Rights Act of 1964 by incorporating its broader reach into the Equal Pay Act (Petition, A19-20).[3]

---

2. Performance of such a judicial job evaluation is contrary to the clear legislative history of the Equal Pay Act. Since 1945 equal pay bills were introduced in every session of Congress by members of both politcial parties. However, it was not until the 88th Congress and after the word "equal" had been substituted for the word "comparable" in describing work for which equal pay was being mandated that the enactment of an equal pay bill became possible (108 Cong. Rec. 14767-14768, 14771).

3. Title VII of the Civil Rights Act provides a complete panoply of rights to females injured by alleged discrimination based on sex in access to employment opportunities.

Thus, it is respectfully submitted that the Petition raises important questions of federal law which this Court should resolve.

BRUCE W. KAUFFMAN,
WILLIAM T. COLEMAN, JR.,
DAVID PITTINSKY,
EDWARD F. MANNINO,
2600 The Fidelity Building,
Philadelphia, Pennsylvania. 19109
Attorneys for Petitioner,
Wheaton Glass Company.

Of Counsel:
MARCUS MANOFF,
DILWORTH, PAXSON, KALISH
& LEVY.

JOSEPH B. KAUFFMAN,
1421 Atlantic Avenue,
Atlantic City, New Jersey. 08401

Dated: May 11, 1970.

CERTIFICATE OF SERVICE.

I hereby certify that on this 11th day of May, 1970, five copies of the Reply Memorandum for Petitioner were hand delivered to each of the following attorneys:

Bessie Margolin, Esq.
United States Department of Labor
Washington, D. C. 20210

Solicitor General
Department of Justice
Washington, D. C. 20530

Albert K. Plone, Esq.
400 Market Street
Camden, New Jersey 08102

I further certify that all parties required to be served have been served.

/s/ Bruce W. Kauffman,
Bruce W. Kauffman,
2600 The Fidelity Building,
Philadelphia, Pa. 19109
Attorney for Petitioner.